Supreme Court, U.S.
FILED
06-841 JUL 31 2006
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ANNETTE DAVIS,

Petitioner

vs.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS

Respondent

On Petition For Writ Of Certiorari

To The United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Ryan J. Wood, Esq.
Attorney for Petitioner
3300 Edinborough Way #600
Edina, MN 55435
(952) 835-7000

QUESTION PRESENTED

Whether the Federal Courts' traditional hospitable approach to *pro se* litigants compels the Clerk of Court for the United States Court of Appeals for the Federal Circuit to file an untimely Notice of Appeal to that Court, which Notice of Appeal would have been filed timely had it not been filed with the incorrect Federal Court, and which incorrect Federal Court failed to notify the *pro se* Petitioner in such time satisfactory for the *pro se* Petitioner to refile her Notice of Appeal in the correct Federal Court in a timely manner.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Hannigan v. U.S., 341 F.2d 587
(10th Cir. 1965)..... 5

STATUTES AND RULES

None

OTHER

None

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at Appendix A to the Petition and is unpublished.

The Memorandum Decision of the United State Court of Appeals for Veteran's Affairs appears at Appendix B to the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Federal Circuit decided the underlying case was May 1, 2006. Petitioner did not request a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, subd. 1.

The United States Court of Veterans Claims also issued a memorandum decision on December 21, 2004, a copy of which is attached hereto as Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No specific constitutional or statutory provisions are involved; the issues presented herein involve an interpretation of case law.

STATEMENT OF THE CASE

On December 21, 2004 the United States Court of Appeals for Veterans Claims entered an Order and Judgment affirming the Board of Veterans Appeals decision denying Petitioner retroactive benefits. Petitioner's counsel declined to assist in any further appeal of the underlying claims, and did not instruct Petitioner on the precise procedure for perfecting any further appeal. Petitioner sought the advice of a *pro bono* attorney, who told her that she would need to file her appeal with the United States Court of Appeals for the Eighth Circuit. On February 17, 2005, Petitioner filed her appeal with the Eighth Circuit, and within the time period otherwise described in the Federal Rules of Appellate Procedure. On July 18, 2005, after her inquiry into the status of her appeal, the Eighth Circuit Court of Appeals returned Petitioner's documents to her, and indicated that she had filed the papers with the wrong court. On August 17, 2005, Petitioner sent by mail (thereafter filed with the Court on August 22, 2005) a Notice of Appeal to the United States Court of Appeals for Veterans Claims, and in that letter explained to the Clerk the frustrations she endured as well as the misguided directions she had been given in order to perfect her appeal. On December 13, 2005, the United States Court of Appeals for Veterans Claims ordered its Clerk to file the appeal with this Court. Accordingly, nearly four months after the renewed attempt at filing the Notice, on December 14, 2005 the Clerk re-directed the Notice to the United States Court of Appeals for the Federal Circuit. This Court on February 27, 2006 directed Petitioner to show cause why her appeal should not be dismissed as untimely.

REASONS FOR GRANTING THE PETITION

This court should construe Petitioner's Notice of Appeal as timely. Petitioner's experiences and actions fall into the category of excusable neglect. In Alley v. Dodge Hotel, 501 F.2d 880, 884 (D.C. Cir. 1974), the United States Court of Appeals for the D.C. Circuit held that the filing of a Notice of Appeal must be viewed with a common-sense approach, that the effort itself in attempting to execute the Notice is more important than innocuous irregularities, and that fundamental fairness dictated such an approach. Of particular concern in Alley was the plight of the *pro se* litigant in maneuvering through the Rules, and that the decision whether to accept a late filing should reflect a "hospitable approach...to pro se litigants." See Id. at 886 (indicating that a hearing would be appropriate to establish the propriety of the neglect). The tradition in the federal courts that aids those persons unrepresented by counsel in the vindication of their rights is well-established. See, e.g., Hannigan v. U.S., 341 F.2d 587 (10th Cir. 1965) (holding, in a criminal case, that time for appeal begins when the claimant has been advised of the right to appeal and has been provided the effective assistance of counsel). Hannigan also described court clerks as having an affirmative duty to prepare a notice of appeal on a claimant's behalf. Id.

There is no prejudice to the Secretary in having this Court entertain the claims. Also, the delay involved has no impact on the rights of any party other than the Petitioner. Petitioner acted in good faith and the delay involved, here, was compounded by the failure of the various Clerks of Court to respond appropriately and timely to what must clearly have been to them *at the time of the erroneous filings* obvious error on the part of the Petitioner. See generally George v. City of Wichita, 353 F.Supp.2d 1131 (D. Kan. 2005).

CONCLUSION

The United States Supreme Court is the highest Federal Court and is responsible for maintaining order in its lower courts. Based upon the arguments above, this Court should order the Court of Appeals for the Federal Circuit to construe the Petitioner's Notice of Appeal as timely. This Court either should direct the Court of Appeals for the Federal Circuit to accept the late Notice or, in the alternative, direct a lower court of competent jurisdiction to extend the time for filing the Notice of Appeal.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Ryan J. Wood, Esq.
Attorney for Petitioner
3300 Edinborough Way #600
Edina, MN 55435
(952) 835-7000

December 14, 2006

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-7043

ANNETTE DAVIS,
Claimant-Appellant,
v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,

Respondent-Appellee.

Before BRYSON, GAJARSA, and PROST, Circuit Judges.

PER CURIAM.

ORDER

Annette Davis responds to the court's order directing her to show cause why her appeal should not be dismissed as untimely.

The certified list of docket entries of the United States Court of Appeals for Veterans Claims in Davis v. Principi, No. 02-331, reflects that the judgment affirming the decision of the Board of Veterans' Appeals was entered on December 21, 2004. The list further reflects that Davis filed

her notice of appeal on August 22, 2005.

An appeal from a decision of the Court of Appeals for Veterans Claims must be filed within 60 days of entry of judgment. See 38 U.S.C. § 7292(a); Fed. R. App. P. 4(a)(1). In this case, the notice of appeal was due no later than February 22, 2005. Because Davis's notice of appeal was filed on August 22, 2005, 244 days after entry of judgment, it is untimely.

Davis explains that she filed a timely notice of appeal in the wrong court, the United States Court of Appeals for the Eighth Circuit, on February 17, 2005. It appears that the Eighth Circuit did not docket her appeal and returned it to her on July 18, 2005. Davis subsequently filed a second notice of appeal in the Court of Appeals for Veterans Claims on August 22, 2005, and that appeal is presently before the court. Davis argues that the delay in this case has not prejudiced the Secretary of Veterans Affairs and requests that the court consider her appeal timely based on these circumstances.

The time limit for filing a notice of appeal is jurisdictional. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) ("It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' " (citation omitted)). Thus, Davis's failure to file timely a notice of appeal may not be waived. See Oja v. Army, 405 F.3d 1349, 1358 (Fed. Cir. 2005) (time provisions of Fed. R. App. P. 4(a) are not subject to equitable tolling). Therefore, the appeal must be dismissed.

Accordingly,

IT IS ORDERED THAT:

(1) Davis's appeal is dismissed.

(2) Each side shall bear its own costs.

(3) All pending motions are moot.

FOR THE COURT

May 1, 2006
Date

s/ Jan Horbaly
Jan Horbaly
Clerk

cc: Annette Davis
J. Reid Prouty, Esq.

FILED

U.S. COURT OF APPEALS FOR

THE FEDERAL CIRCUIT

MAY 1 – 2006

JAN HORBALY

CLERK

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-331

ANNETTE DAVIS, APPELLANT,
V.
ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before IVERS, *Chief Judge*.

MEMORANDUM DECISION

Note: Pursuant to US. Vet. App. R. 30(a), this action may not be cited as precedent.

IVERS, *Chief Judge:* Before the Court is a January 18, 2002, decision of the Board of Veterans' Appeals (BVA or Board.), which denied the appellant's claim for an effective date prior to April 9, 1998, for the grant of service connection for a psychiatric disorder. This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski,* 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the decision of the Board.

I. BACKGROUND

The veteran served on active duty in the U.S. Army from August 1968 through November 1969. Record (R.) at

12. Her entrance medical examination did not note the presence or history of any psychological conditions. R. at 14-17. At her separation examination in October 1969, the veteran was pregnant and reported frequent trouble sleeping, depression or excessive worry, and nervous trouble. R. at 36-39. However, her psychiatric condition was not evaluated at that time. *id.* A September 1969 clinical record showed that the veteran "f[ound] it difficult to establish any meaningful relationship with other people" and that she was "dissatisfied with being in the military and want[ed] to get out." R. at 49.

In November 1993, the veteran submitted a VA Form 21-526, Veteran's Application for Compensation or Pension, for, inter alia, [r]ecurring depression." R. at 102-05. In response to all the questions relating to compensation for conditions related to service, the veteran answered "N/A." *Id.* In February 1994, she submitted private medical records dated February 1993 through January 1994. R. at 114-31. These records reveal that she was treated for depression and anxiety. *Id.* At an initial psychiatric evaluation in October 1993, she reported a greater-than-ten-year history of anxiety and depression that had become worse over the previous six to nine months. R. at 119. The veteran had stated that she felt her job was too stressful and that she had had similar symptoms since the breakup of her marriage in the 1980s. *Id.* The examiner also noted a positive family history of depression. *Id.* The veteran identified additional stress factors in her life as her two teenage daughters and her significant other. R. at 125. At a VA psychiatric examination in March 1994, the veteran told the examiner that she had been raped by her sergeant in service, that she had become pregnant, and had given the child up for adoption right after the birth. R. at 135-38. The veteran attributed stress in her life to her job, breaking up with her boyfriend, bankruptcy, and health issues. *Id.* In April 1994, the regional office (RO) awarded the veteran non-service-connected pension benefits for, inter alia, major depressive disorder, rated at 50% disabling. R. at 147-49.

In April 1998, the veteran contacted the RO and reported that she believed she was suffering from post-traumatic stress (PTSD) disorder as a result of the rape in service, subsequent pregnancy, discharge from the military, and giving her child up for adoption. R. at 291. In a May 1998 statement in support of claim, the veteran detailed the facts surrounding the rape by her sergeant and -how the combined traumas of the attack, the pregnancy, the discharge, and the adoption affected her then and continued to affect her as time went on. R. at 289-301. The veteran was given a VA compensation and pension psychological evaluation in August 1998. R. at 311-16. The examiner concluded that the veteran was not suffering from PTSD, but did diagnose major depressive disorder and anxiety disorder with PTSD features. R. at 315. The psychologist concluded that "it would be impossible to say that Ms. Davis' significant disability is entirely related to military service" but that it was "likely" that her in-service rape "contributed signifrcantly to her difficulties in being able to function at work and in an intimate relationship with her husband." R. at 316.

In an October 1998 rating decision, the RO awarded the veteran service-connected benefrts for her psychiatric disorder, rated at 50% disabling. R. at 323-27. The RO assigned an effective date of April 9, 1998, the date she contacted the RO regarding a claim for service connection for PTSD. *Id.* The veteran filed a notice of disagreement in March 1999 disagreeing with the rating and effective date assigned. R. at 336. The RO issued a Statement of the Case in April 1999 continuing the 50% rating and finding no basis for the assignment of an earlier effective date. R. at 343-48. The Board issued a decision dated April 5, 2000, remanding claims for an increased rating and for compensation pursuant to 38 U.S.C. § 1151 and denying her claim for an earlier effective date. R. at 375-86. By order dated April 27, 2001, this Court vacated the Board's April 2000 decision for readjudication pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106475, 114 Stat. 2096 (Nov. 9, 2000).

R. at 412. On January 18, 2002, the Board again denied the veteran's claim for an earlier effective date for her psychiatric disorder. R. at 1-9. This appeal followed.

II. ANALYSIS

The determination of an effective date for an award of disability compensation is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Mindenhall v. Brown,* 7 Vet.App. 271, 275 (1994); *see also* 38 U.S.C. § 7261(a)(4). In determining whether a finding is clearly erroneous, "this Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible basis' in the record for the factual determinations of the BVA . we cannot overturn them." *Gilbert* v. *Derwinski,* 1 Vet.App. 49, 53 (1990). Generally, the effective date of an award of compensation shall be frxed in accordance with the facts found, but shall not be earlier than the date of the application therefor. 38 U.S.C. § 5110(a); *see also* 38 C.F.R. § 3.400 (2003) (unless otherwise provided, the effective date of an award of disability compensation "will be the date of receipt of the claim or the date entitlement arose, whichever is the later").

A claim for benefits may either be a formal or informal communication "requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (2003).

> A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered a claim for pension; and a claim by a

> veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.

38 C.F.R. § 3.151(a) (2003). The Secretary is not required to treat every compensation claim as a pension claim or to treat every pension claim as a compensation claim. *Stewart v. Brown,* 10 Vet.App. 15, 18 (1997). "Rather, the Secretary has to exercise his discretion under the regulation in accordance with the contents of the application and the evidence in support of it. *See Willis v. Brown,* 6 Vet.App. 433, 435 (1994) (the operation of the word 'may,' in the regulation, clearly indicates discretion)." *Stewart,* 10 Vet.App. at 18.

The appellant argues that the effective date for her service-connected benefits award should be in November 1993, when she first filed an application for benefits for " [r] ecurring depression" (R. at 102-05). She contends that that application should have been construed by the RO as an application for service-connected benefits rather than a claim for pension. The appellant argues that the RO had a heightened duty to assist her, as a victim of sexual assault, in the development of her claim pursuant to *Patton v. West,* 12 Vet.App. 272 (1999). She further asserts that the same evidence that was of record at the time she filed a claim for service connection for PTSD was of record in November 1993 and that, had the RO properly developed her claim, service-connected benefits would have been awarded at that time.

In the decision here on appeal, the Board found that the appellant's 1993 application for benefits was properly construed as an application for pension rather than service-connected benefrts. R. at 7-9. The Board noted that in her 1993 application for benefits the appellant had replied "N/A" to the portions of the application pertaining to service-connected benefits and that nothing in her application indicated an intent to seek service-connected benefrts. R. at 7. Although the

appellant reported the in-service rape when she was examined in connection with that claim, she did not indicate that she felt that experience was related to her condition at that time, nor did the examiner conclude that it was a factor in her current condition.

Contrary to the appellant's arguments, the evidence of record in November 1993 was not the same as the evidence of record in 1998 when service connection was awarded. In 1998, the RO had the appellant's assertion, for the first time, that she felt that she was suffering from PTSD as a result of an in-service rape. As the appellant points out in her brief, that alone would not have been sufficient for an award of service connection, nor would her failure to specifically attribute her condition to service have necessarily justified the denial of a claim for service-connected benefits. *See Espiritu v. Derwinski,* 2 Vet.App. 492 (1992). However, Ms. Davis' opinion as to the etiology of her condition in 1993 is relevant in determining whether it was her intent in 1993 to file a claim for pension benefits or a claim for service-connected benefits. The Court finds that this evidence, as well as the appellant's "N/A" responses in her 1993 application, supports the Board's conclusion that the appellant did not express an intent in 1993 to apply for service-connected benefits for her psychiatric condition. Moreover, in 1993 there was no medical evidence of record indicating that the in-service rape and subsequent events contributed to the appellant's current condition as there was in 1998. Although the appellant argues that the VA examiner *should* have reached that conclusion in 1993 and *would* have reached that conclusion had the RO properly assisted her in 1993, no such opinion was of record in 1993. Accordingly, it cannot be said that had the RO construed the claim as a claim for service-connected benefits, such benefits would have been awarded. *See Stewart,* 10 Vet.App. at 19. Moreover, an alleged failure to assist a veteran in the development of a claim cannot form the basis for an earlier effective date. *See Cook v. Principi,* 318 F. 3d 1334, 1338-41 (Fed. Cir. 2002). The Court finds that there is a plausible

basis in the record for the Board's conclusion that the proper effective date for the appellant's award of service-connected benefits is April 9, 1998. *See Mindenhall* and *Gilbert* both *supra*. Accordingly, we must affirm. *Id.*

III. CONCLUSION

Upon consideration of the foregoing, the January 18, 2002, decision of the Board of Veterans' Appeals is AFFIRMED.

DATED: NOV 30 2004

Copies to:

Theresa A. Capistrant, Esq.
3009 Holmes Ave., So.
Minneapolis, MN 55408

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-7043

ANNETTE DAVIS,

Claimant-Appellant,

v.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellee.

MEMORANDUM AND RESPONSE TO ORDER TO SHOW CAUSE

PROCEDURAL HISTORY

On December 21, 2004 the United States Court of Appeals for Veterans Claims entered an Order and Judgment affirming the Board of Veterans Appeals decision denying Claimant-Appellant retroactive benefits. Claimant-Appellant's counsel declined to assist in any further appeal of the underlying claims, and did not instruct Claimant-Appellant on the precise procedure for perfecting any further appeal. (Davis Aff. ¶ 3.) Claimant-Appellant sought the advice of *a pro bono* attorney, who told her that she would need to file

her appeal with the United States Court of Appeals for the Eighth Circuit. (Davis Aff. ¶ 4.) On February 17, 2005, Claimant-Appellant filed her appeal with the Eighth Circuit, and within the time period otherwise described in the Federal Rules of Appellate Procedure. (Davis Aff. Ex. 1.) On July 18, 2005, after her inquiry into the status of her appeal, the Eighth Circuit Court of Appeals returned Claimant-Appellant's documents to her, and indicated that she had filed the papers with the wrong court. (Davis Aff. Ex. 2.) On August 17, 2005, Claimant-Appellant sent by mail (thereafter filed with the Court on August 22, 2005) a Notice of Appeal to the United States Court of Appeals for Veterans Claims, and in that letter explained to the Clerk the frustrations she endured as well as the misguided directions she had been given in order to perfect her appeal. (Davis Aff. Ex. 3.) On December 13, 2005, the United States Court of Appeals for Veterans Claims ordered its Clerk to file the appeal with this Court. (Davis Aff. Ex. 4.) Accordingly, nearly four months after the renewed attempt at filing the Notice, on December 14, 2005 the Clerk re-directed the Notice to the United States Court of Appeals for the Federal Circuit. (Davis Aff. Ex. 5.) This Court on February 27, 2006 directed Claimant-Appellant to show cause why her appeal should not be dismissed as untimely.

ARGUMENT

This court should construe Claimant-Appellant's Notice of Appeal as timely. Claimant-Appellant's experiences and actions fall into the category of excusable neglect. In Alley v. Dodge Hotel, 501 F.2d 880, 884 (D.C. Cir. 1974), the United States Court of Appeals for the D.C. Circuit held that the filing of a Notice of Appeal must be viewed with a common-sense approach, that the effort itself in attempting to execute the Notice is more important than innocuous irregularities, and that fundamental fairness dictated such an approach. Of particular concern in Alley was the plight of the *pro se* litigant in maneuvering through the Rules, and that the decision whether to accept a late filing should reflect

a "hospitable approach...to pro se litigants." See Id. at 886 (indicating that a hearing would be appropriate to establish the propriety of the neglect). The tradition in the federal courts that aids those persons unrepresented by counsel in the vindication of their rights is well-established. See, e.g., Hannigan v. U.S., 341 F.2d 587 (10th Cir. 1965) (holding, in a criminal case, that time for appeal begins when the claimant has been advised of the right to appeal and has been provided the effective assistance of counsel). Hannigan also described court clerks as having an affirmative duty to prepare a notice of appeal on a claimant's behalf. Id.

There is no prejudice to the Secretary in having this court entertain the claims. Also, the delay involved has no impact on the rights of any party other than the Claimant-Appellant. Claimant-Appellant acted in good faith and the delay involved, here, was compounded by the failure of the various Clerks of Court to respond appropriately and timely to what must clearly have been to them *at the time of the erroneous filings* obvious error on the part of the Claimant-Appellant. See generally George v. City of Wichita, 353 F.Supp.2d 1131 (D. Kan. 2005).

CONCLUSION

Based upon the arguments above, this Court should construe the Claimant-Appellant's Notice of Appeal as timely. This Court either should accept the late Notice or, in the alternative, direct a lower court of competent jurisdiction to extend the time for filing the Notice of Appeal.

Dated: 17 March 2006

Respectfully submitted,
s/ Annette Davis
Annette Davis
Claimant-Appellant
715 Upton Avenue North
Minneapolis, MN 55411
(612) 522.3980

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-7043

ANNETTE DAVIS,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,

Respondent-Appellee.

Affidavit of Annette Davis

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Annette Davis, being first duly sworn on oath states and deposes as follows:

1) I am the Claimant-Appellant in the above-entitled matter, and as such have personal knowledge of facts and circumstances involved in this matter, and provide this Affidavit for the purposes of responding to this court's Order to Show Cause. The attached documents, all true and correct copies, marked as Exhibit A and with an index, comprise the substance of my paper trail that was generated simply due to my attempts to perfect my appeal.
2) My intention is to appeal the decision of the United States Court of Appeals for Veteran's Claims (hereafter CAVC) dated November 30, 2004, and which Judgment was entered December 21, 2004, wherein that Court affirmed the decision of the Board of Veteran's Appeals

(BVA) and declined to extend my Veteran's Benefits retroactively, and concomitantly appeal the decision of the BVA in the first instance to deny the retroactive payments.

3) Although I wished to appeal the decision of the CAVC, the attorneys representing me in the underlying matter declined to assist me in my pursuit of further appeal. My attorneys did not tell me the specific steps I would need to take to, appeal the case further.

4) Upon the advice of a *pro bono* lawyer, I mistakenly filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit. The Notice of Appeal was received by the Eighth Circuit clerk on February 17, 2005, which Notice of Appeal would have been timely (and even early) had I filed it with the United States Court of Appeals for the Federal Circuit. Instead of immediately informing me of my error, the Eighth Circuit several months later and upon my inquiry indicated that it had diverted my Notice of Appeal to another federal court, and now it has reached the instant judicial body.

5) The Appellee's Notice Regarding BVA Decision and Motion to Dismiss, which memorandum advocates dismissing my appeal, uses as its main thrust the fact that I merely made a poor word choice when attempting to describe the decision from which I was appealing. Indeed, there was no BVA decision dated December 21, 2004, but surely the Secretary knows that the Court of Appeals for Veteran's Claims on November 30, 2004 (judgment entered December 21, 2004) affirmed the BVA decision and that it is this Order and date form which my appeal is made.

6) I believe that my request to commence this appeal, although presumptively untimely under

the Rules, is made in good faith; the fact that this Court provided me with the opportunity to show cause indicates to me that my appeal should be construed as timely.

FURTHER YOUR AFFIANT SAYETH NOT

/s Annette Davis
Annette Davis

Subscribed and sworn to before
me this 17th day of March, 2006

/s Lisa M. Kelly
Notary

Lisa M. Kelly
Notary Public
Minnesota
My Commission Expires January 31, 2010

INDEX TO EXHIBIT A

1. Notice of Appeal received by the Eighth Circuit on February 17, 2005.

2. July 18, 2005 Letter from Maureen Watz Gornik.

3. August 17, 2005 letter from Annette Davis to Clerk of the United States Court of Appeals for Veterans Claims.

4. December 13, 2005 Order of the Hon. William P. Greene, Jr.

5. December 14, 2005 letter from Norman Y. Herring to Clerk of the United States Court of Appeals for the Federal Circuit.

U.S. COURT OF APPEALS-EIGHTH CIRCUIT
APPEAL DOCKET NO.

ANNETTE DAVIS, APPELLANT,

V.

ANTHONY J. PRINCIPI,

SECRETARY OF VETERANS AFFAIRS, APPELLEE.

NOTICE OF APPEAL

Annette Davis, hereby appeals the judgment and order of the United States Court of Appeals for Veterans Claims dated December 21, 2004, denying her claim for entitlement to an effective date prior to April 9, 1998, for the grant of service connection for a psychiatric disorder, to include an anxiety disorder and depression.

Respectfully Submitted,

/s Annette Davis

Annette Davis
1531 Penn Avenue North
Minneapolis, Minnesota 55411
Telephone

RECEIVED
FEB 17 2005
U.S. COURT OF APPEALS
EIGTH CIRCUIT
ST. PAUL

United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Reply to
500 Federal Building
316 N. Robert Street
St. Paul, MN 55101
VOICE (651) 848-1300
FAX (314) 244-2780
www.ca8.uscourts.gov

July 18, 2005

Ms. Annette Davis
1531 Penn Ave. N.
Minneapolis, MN 55411

Dear Ms. Davis:

Enclosed are the documents I spoke with you about moments ago on the phone. I am returning your "Notice of Appeal" with attachments to you because we do not handle appeals of decisions by the Secretary of Veterans Affairs. I am including a handbook which addresses the appeals process for claims for veterans benefits. I hope you find this helpful.

As I mentioned on the phone, please keep a copy of the face of your "Notice of Appeal" which shows it was received in our office February 17, 2005. This may become important if your appeal is challenged as untimely.

I regret this was not returned to you earlier. Good luck in processing your appeal.

Sincerely,

/s Maureen Watz Gornik

Maureen Watz Gornik
Deputy in Charge

Enc.

ANNETTE DAVIS
1531 PENN AVENUE NORTH
MINNEAPOLIS, MINNESOTA 55411

17 August 2005

Clerk, US Court of Appeal for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

RE: NOTICE of APPEAL for: Annette Davis, Appellant,
-V- Anthony J. Principi, Secretary of Veterans Affairs,
Appellee

Dear Clerk, US Court of Appeal for Veterans Claims:

I have been trying to returned my copy of the Appeal I made against the decision on my veterans disability claim for an effective date of entitlement prior to April 9, 1998, for the grant of service connection for a psychiatric disorder, to include an anxiety disorder, and depression.

However, as you can see, my appeal of the denial dated December 21, 2004, was filed on time at the United States Court of Appeals for the Eighth Circuit, at the Federal Court House in Minneapolis, and transferred to the Federal Court In Saint Paul, Minnesota, on February 16, 2005. In plenty Of time to meet the deadline for appeal.

However, the Court of Appeal in Saint Paul, Minnesota, kept My Claim and did not contact me until I called in July 2005, Inquiring about the status of my claim, and that is when I was told I had filed in the wrong court and had my appeal returned to me with the date stamped on it for which they received my Appeal. I was advised to send it to the proper court and if there Were any problems you could contact them at the

address and Telephone number on their letter to me to confirm they received My Appeal on time. Thanking you in advance.

Sincerely,

/s Annette Davis

Annette Davis, Appellant

Not published

UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS

No. 02-331

ANNETTE DAVIS, APPELL

V.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELL

Before GREENE, *Chief Judge.*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(A),

This action may not be cited as precedent.

The Court has received from the appellant what the Court construes as an attempted Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit, which the appellant mistakenly filed with the U.S. Court of Appeals for the Eighth Circuit.

On consideration of the foregoing, it is

ORDERED that the Clerk will file the appellant's construed appeal to the Federal Circuit.

DATED: DEC 13 2005 BY THE COURT:

/s William P. Greene, Jr

WILLIAM P. GREENE, JR.
Chief Judge

Copies to:
Theresa A. Capistrant, Esq.
Annette Davis
VA General Counsel (027)

UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS
625 Indiana Avenue, NW, Suite 900

Washington, DC 20004-2950

December 14, 2005

Jan Horbaly, Clerk
U.S. Court of Appeals for the Federal
Circuit 717 Madison Place, NW
Washington, DC 20439

Re: Annette Davis
Our Case No. 02-0331

Dear Mr. Horbaly:

Enclosed is a notice of appeal to your court. It was received by this Court on August 22, 2005.

The judgment of this Court was entered on December 21, 2004. Copies of the judgment and docket in this case are also enclosed.

A total of 244 days elapsed between decision or judgment and receipt of the appeal, counting the first day after the decision or judgment was entered. Section7292(a), title 38, United States Code, requires that a notice of appeal of the decision of this Court be filed within 60 days after this Court's entry of judgment or order.

Sincerely,

/s Norman Y. Herring

NORMAN Y. HERRING
Clerk of the Court

Enclosures

Appeal Information Sheet